FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 26 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

STEPHEN A. MITCHELL,
Counsel for Petitioner.

WILLIAM I. CONWAY,
SHERLOCK J. HARTNETT,
of Counsel.

INDEX

Subject Index

	Page
Opinion below	1-2
Jurisdiction	2
Constitutional provisions involved	3
Questions presented	3
Statement of the case	4
Argument:	8-33
I. The petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; there was no effective appointment of counsel	8
A. Introductory	8
B. Controlling decisions in this Court	10
C. A citizen charged with a capital crime is entitled to counsel at every step of the proceedings against him	14
D. The gravity of the charge and the intricacies of the defense emphasize petitioner's need for counsel	17
E. The appointment of Mr. Tuesburg was an admission of petitioner's Ignorance and indigence; this appointment was limited to a special hearand did not constitute a general apance for petitioner	20
F. In this capital case the totality of the facts and circumstances required an effective appointment of counsel before acceptance of a plea of guilty	21
II. Neither his plea of guilty nor his failure to claim and demand aid of counsel, amounted to an intelligent and competent waiver of counsel by this petitioner	23
A. Controlling decisions in this Court	23

Page

B. Under the circumstances, a plea of guilty to a charge of murder was not a waiver of the right to aid of counsel 25

C. The failure of this petitioner to take affirmative action in order to obtain counsel, was not an express and intelligent consent to the loss of his Constitutional rights. Petitioner did not affirmatively waive his Federal right to counsel 26

D. Every reasonable presumption is indulged against a purported waiver of fundamental Constitutional rights 30

E. The record does not show a determination by the trial Court that there was a competent and intelligent waiver by this petitioner 30

Conclusion 33

Citations

Cases:

Adams v. *U. S.*, 317 U. S. 269, 275, 276, 277, 278, 279, 21, 24, 27

Aetna v. *Kennedy*, 301 U. S. 389, 393 30

Avery v. *Alabama*, 308 U. S. 444, 447 ..... 14, 19, 22

Betts v. *Brady*, 316 U. S. 455, 462 ..... 14, 16, 22

Betts v. *Brady*, 316 U. S. 455, 477-80 (Dissenting opinion) Appendix to Note 2, pg. 477 ..... 16, 17

Canizio v. *New York*, 327 U. S. 82 ..... 10, 12

Evans v. *Rives*, 126 F. (2d) 633 ..... 16, 25, 26

Frame v. *Hudspeth*, 309 U. S. 632, reversing 109 F. (2d) 356 ..... 25, 26

Glasser v. *U. S.*, 315 U. S. 60, 70, 76 ..... 14, 23, 27, 30

Grosjean v. *American Press Co.*, 297 U. S. 233, 243, 244 ..... 14, 19

Hebert v. *Louisiana*, 272 U. S. 312, 316 ..... 10, 13

Hodges v. *Easton*, 106 U. S. 408, 412 30

Holden v. *Hardy*, 169 U. S. 366, 389 9

Page

Johnson v. *Zerbst*, 304 U. S. 458, 462, 464, 465, 468, 469 ..... 19, 24, 25, 30, 32
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307 30
Palko v. *Conn.*, 302 U. S. 319, 327 22
Patton v. *U. S.*, 281 U. S. 276, 312 ..... 10, 24, 25, 28, 32
People v. *Bernovich*, 391 Ill. 141, 143, 62 N. E. 2d 691 26
People v. *Dugas*, 310, Ill. 291, 300, 141 N. E. 769 ..... 17, 18
People v. *Lewis*, 375 Ill. 330, 331, 333, 334, 31 N. E. 2d 795 17
People v. *McWilliams*, 348 Ill. 333, 180 N. E. 832 21
People v. *Popescue*, 345 Ill. 142, 177 N. E. 739 21
Powell v. *Alabama*, 287 U. S. 45, 57, 61, 68, 69, 70, 71, 72 ..... 9, 11, 13, 15, 19, 28, 29, 31, 33
Rice v. *Olson*, 324 U. S. 786, 788, 789 ..... 10, 12, 25
Smith v. *O'Grady*, 312 U. S. 329, 334 ..... 14, 25, 26
Tompkins v. *Missouri*, 323 U. S. 485, 487, 488, 489, ... 10, 11, 12, 15, 19, 25
Walker v. *Johnston*, 312 U. S. 275, 286 ..... 16, 25, 26, 31
Williams v. *Kaiser*, 323 U. S. 471, 475, 476 ..... 12, 14, 15, 19, 29

Statutes:

United States Constitution:
Fourteenth Amendment 3
Illinois State Constitution, Art II, Sec. 9 34
Ill. Rev. Stat. 1927 ch. 38 par. 754 26
Ill. Rev. Stat. 1945 ch. 38 par. 358 34
Ill. Rev. Stat. 1945 ch. 38 par. 360 34
Ill. Rev. Stat. 1945 ch. 38 par. 361 35
Ill. Rev. Stat. 1945 ch. 38 par. 362 35
Ill. Rev. Stat. 1945 ch. 38 par. 363 35
Ill. Rev. Stat. 1945 ch. 38 par. 364 35
Ill. Rev. Stat. 1945 ch. 38 par. 367 35
Ill. Rev. Stat. 1945 ch. 38 par. 730 26
Ill. Rev. Stat. 1945 ch. 38 par. 732 ..... 21, 28

Miscellaneous:

Brief of Petitioner—Pg. 27-30, in *Walker* v. *Johnston*, October Term, 1940, No. 173 (312 U. S. 275) 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

This case is before the Court on writ of certiorari granted May 6, 1946 (R. 6) to review a judgment of the Supreme Court of Illinois (R. 44), affirming a judgment of the Circuit Court of Livingston County, Illinois, convicting the Petitioner on June 15, 1928, of the crime of murder, on a plea of guilty, and sentencing him on June 29, 1928, to imprisonment for 99 years (R. 8-12).

Opinion Below

The Supreme Court of Illinois rendered an opinion (R. 43, 44), 391 Ill. 594; 63 N. E. 2nd 763; as follows:

> "This is a review on writ of error sued out by plaintiff in error *pro se*, seeking reversal of a judgment

of the Circuit Court of Livingston County sentencing him to the penitentiary for 99 years on a charge of murder and his plea of guilty thereon. No bill of exceptions has been filed. The only questions, therefore, that this Court can consider are those on the common-law record.

"His first contention is that the Court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the Court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the Court appoint one for him. (*People* v. *Braner*, 389 Ill. 190; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Childers*, 386 Ill. 312). There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot be sustained. *People* v. *Stubblefield*, No. 29048; *People* v. *Stack*, No. 28738; *People* v. *Braner*, 389 Ill. 190.

"Other errors assigned relate to his complaint that he was deprived of due process of law by reason of the method of his arrest and that he did not have a fair trial based upon competent evidence. There is no basis in the common-law record on which the Court can review such questions. Therefore they cannot be considered. *People* v. *Lantz*, 387 Ill. 72; *People* v. *Bertrand*, 385 Ill. 289; *People* v. *Keller*, 353 Ill. 411.

"The judgment of the Circuit Court of Livingston County is affirmed.

Judgment affirmed."

Jurisdiction

The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in part:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; • • •."

Questions Presented

The petitioner claims that he is imprisoned in violation of the Fourteenth Amendment to the United States Constitution. He is now imprisoned in the Illinois State Penitentiary, where he was committed pursuant to a judgment and sentence of the Circuit Court of Livingston County, Illinois, on June 29, 1928, for a term of ninety-nine years. On Writ of Error, the judgment of the trial Court was affirmed by the Supreme Court of Illinois on November 21, 1945. The following questions are presented:

1. Whether the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial;

2. Whether the petitioner was denied the benefit of an effective appointment of counsel;

3. Whether petitioner, being charged with a capital crime, was entitled to counsel at every step of the proceedings against him;

4. Whether petitioner's plea of guilty and his failure to claim and demand aid of counsel, amounted to an intelligent and competent waiver of counsel;

5. Whether under the circumstances in this capital case, the absence of a determination on the record by the trial Court that there was a competent and intelligent waiver by this petitioner, disposes of any contention that there was a proper waiver in this case.

Statement of the Case

Petitioner asserts that the trial Court did not appoint counsel to advise and assist petitioner before and during arraignment; that he was held *incommunicado* for fourteen (14) days from the time of his arrest until arraignment on June 15, 1928; that he was subjected to secret inquisition by relays of officers and investigators during this "incommunicado period"; that petitioner was moved from one county to another during this period because of mob violence. (Petition for Writ of Error, R. 41-42).

James Churchill was killed by gunfire on May 31, 1928 (R. 3). The homicide occurred in the course of an affray with the petitioner and Livera Word, a colored woman (R. 16, 20). The actual killing followed about twenty minutes (R. 17) after an altercation witnessed or participated in by three other colored women as well as Livera Word and the Petitioner (R. 16, 18, 19, 36, 38, 39).

The circumstances as shown by the testimony at the hearing on the question of mitigation or aggravation, were these: On May 31, 1928, petitioner went fishing with four women and a young boy, the son of one of the women (R. 24). Petitioner drove to a stream near Fairburg, Illinois, in a second-hand Chevrolet Sedan owned by Livera Word, one of the women. It had no license plates (R. 37). In mid-afternoon, the four women and petitioner started back to Fairburg, driving South on a North South Road which had two tracks. One track was a bad, very rough and rutty road on the East side, and the other was a good road, a beaten track, on the West side (R. 15, 17). While driving South on his right side of the road—being the beaten track on the West side—petitioner's progress was blocked when he met two horse-drawn wagons loaded with gravel and traveling North in the beaten track on their left side of the road (R. 17).

Although the beaten track was wide enough for two cars to pass (R. 17), petitioner had to nearly get off the road on the right side to pass the first wagon driven by James Goff (R. 18) and almost tipped into the ditch (R. 35, 39), although Goff "gee-ed" his horses a little from the middle of the road (R. 35, 37).

The petitioner then met Churchill's wagon which was a little farther over in the right of way (R. 35, 36). Churchill stood up on his wagon and told the petitioner to drive around but the petitioner refused and stopped in front of Churchill's horses (R. 16, 17, 36, 38, 39). Churchill got off his wagon (R. 16, 36, 38, 39) and looked at the front and rear of the car for license plates and tried to open the hood of the car to see if it was a stolen car (R. 16, 18, 36).

There was an argument between Churchill and the petitioner and Livera Word as to the right of way and the license plates (R. 16, 36, 37). Churchill started swearing and throwing rocks from the ditch and called the petitioner a "black son of a bitch" (R. 36, 38, 39). Livera Word got out of the car and called Churchill a "black bastard" or "a black-hearted bastard" (R. 36, 38). Churchill got back on his wagon and threw more rocks and gravel on the car as he pulled around it and continued to throw rocks as long as he thought he could hit the car (R. 16, 36, 37, 38, 39). Livera Word and two of the other women got out of the car and called Churchill a "yellow son of a bitch" and "a God damned white son of a bitch" (R. 16, 36, 38) and Churchill kept calling them names (R. 16, 36, 38). Goff, the other teamster, call them "God damned dirty niggers • • • sons of bitches" (R. 36). Churchill's final remark was "Well, I am not a nigger, anyway" (R. 25).

The County Sheriff testified that the top and back of the car showed no dents but the middle of the top and down

the back had been wiped off and looked like yellow clay had been smeared there (R. 40).

Churchill and Goff drove on a mile or so during the immediately following twenty minutes or more (R. 17) before the petitioner and Livera Word returned in her car. The dispute over the right-of-way and the throwing of gravel was resumed when petitioner blew his horn—Churchill refused to move over and again stopped his team (R. 16, 19). Goff and Churchill got off their wagons at the same time (R. 20). Goff testified that Churchill took a couple of steps from his wagon toward the car and the petitioner shoved himself out from under the wheel of the car, took two steps sideways and fired at Churchill; that he didn't sight, and shot very fast three times; that Churchill was shot once thru the heart (R. 16, 20, 21). Churchill was about five feet six inches tall and Goff stood six feet two inches (R. 20), but the petitioner's stature does not appear.

Petitioner was taken into custody in the same evening and was questioned by the States Attorney, Assistant States Attorney, Chief of Police, Sheriff and Deputy Sheriff. Livera Word was brought before the petitioner at one stage of the questioning (R. 29). No stenographer was present but the Sheriff made pencil notations (R. 30). These officers gave petitioner a "hearing" about three o'clock in the morning (R. 34). Later they continued questioning the petitioner as he sat in the back seat of a car on the way to Bloomington (an adjoining county seat) (R. 34) where the petitioner alleges he was taken as a result of mob violence (R. 42). The Chief of Police testified that the petitioner told him during the ride to Bloomington that one word fetched on another and Churchill got off his wagon, and he got out of the car and that he shot when Churchill put his hand up as though he was going into his shirt for a gun (R. 34).

Petitioner was taken in custody on May 31, 1928. On June 12, 1928 (R. 8), he was indicted for the murder of Churchill (R. 2-8). On June 15, 1928, the petitioner was, without benefit of counsel, arraigned and entered a plea of guilty and was immediately convicted by the Circuit Court of Livingston County (R. 8-9).

Upon further hearing on June 15, 1928, the trial Court appointed L. W. Tuesburg, a member of its Bar, to represent the petitioner upon the "question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty", and set a hearing on the question of mitigation or aggravation for June 18, 1928 (R. 9). On June 18, 1928, the trial Court heard evidence on the question of mitigation or aggravation and took "said matter of mitigation or aggravation of the said offense under advisement" (R. 9-10). On June 29, 1928, the petitioner appeared in Court without Mr. Tuesburg and was sentenced to a term of 99 years (R. 10-12).

The judgment of conviction (R. 8), states that petitioner was furnished with a copy of the indictment at the time of arraignment and expressed a desire to plead guilty to the crime of murder as charged; that

> "Thereupon the Court fully explained to the defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to trial before a jury of twelve (12) jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice LeRoy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment" (R. 8, 9).

At the time of arraignment the petitioner was thirty years of age, having been born on June 8, 1898 (R. 13). The trial judge and State's Attorney certified (R. 14) to the pentitentiary officials that the petitioner had no schooling, but could read and write, was of quiet disposition, and average mentality, and had not been in trouble before during three years residence in the County; that he was industrious, having worked eight years for Industrial Track Construction Co., St. Louis, Missouri, and during the previous three years at Ballard and Johnson's Restaurant at Forrest, Illinois; that his occupation was chauffeur, mechanic, cook (R. 13-14). The petitioner is a negro (R. 15).

The Supreme Court of Illinois on March 22, 1945, granted leave to Petitioner to proceed in *forma pauperis* and his petition for Writ of Error was taken under advisement by that Court on September 17, 1945 (R. 1, 43). The trial Court's judgment was affirmed on November 21, 1945, pursuant to opinion filed on that day (R. 43-45).

On May 6, 1946, this Court granted petitioner's motion for leave to proceed in *forma pauperis*, and allowed certiorari (R. 45, 46). On June 10, 1946, this Court appointed the undersigned as counsel for the petitioner.

Argument

I

The petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; there was no effective appointment of counsel.

A. Introductory

This is a capital case. It is our contention that petitioner's imprisonment is unlawful under the Fourteenth Amendment of the United States Constitution. That contention

rests upon cases decided by this Court, upon the principles enunciated in them and upon the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard". *Holden* v. *Hardy*, 169 U. S. 366, 389; *Powell* v. *Alabama*, 287 U. S. 45, 68, 71, 72.

We make two points. First, the petitioner was denied the right of counsel with the customary incidents of that right; there was no effective appointment of counsel. Second, the petitioner's plea of guilty and his failure to assert and demand his right to counsel did not amount to a competent and intelligent waiver of his right to counsel.

Upon arraignment and without benefit of counsel, the petitioner pleaded guilty of murder. The statutory punishment was death by electrocution or imprisonment for any period from fourteen years to life. He was sentenced to a term of ninety-nine years. The almost simultaneous arraignment, plea and conviction occurred three days after indictment and fifteen days after the homicide and petitioner's arrest. The petitioner was not furnished a copy of the indictment until his arraignment. He had no schooling. He was quiet and industrious and had worked as a cook and mechanic for three years prior to conviction. He was thirty years old and had not been in trouble before. These facts appear in the trial Court's judgment and in the Information certified to the penitentiary officials by the trial judge and States Attorney.

Allegations and testimony as to the provocative circumstances leading up to the alleged homicide and his claim of self-defense, as to the holding of the petitioner *incommunicado* and his transfer before arraignment from one county to another as a result of mob violence, appear only in his petition and transcript of testimony. These circumstances have been described in the Statement of the Case,

supra. The transcript was not certified by the trial judge and the State and no Bill of Exceptions was filed.

After petitioner's plea had been received and judgment of conviction had been entered, the Trial Court held a further hearing, also on June 15, 1928. The Court then appointed L. W. Tuesburg, an attorney, "to represent the said defendant Harice LeRoy Carter, commonly known as Roy Carter on question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty and which said question of mitigation or aggravation of said murder is hereby set down for hearing * * *" (R. 9). This hearing was held three days later and on June 29, 1928, the defendant appeared without counsel and was sentenced.

The earlier opinions of this Court and the principles applied to them are considered to be controlling of the issues here presented. Therefore we do not make extended references to the historical background of the Fourteenth Amendment and of the rule of criminal procedure which guarantees petitioner's inherent right to have had counsel appointed.

B. Controlling Decisions in This Court

The petitioner's case falls squarely within this Court's decisions in *Tompkins* v. *Missouri,* 323 U. S. 485, and *Rice* v. *Olson,* 324 U. S. 786, and within the principles laid down in every decision of this Court bearing upon the issues at Bar, beginning with *Hebert* v. *Louisiana,* 272 U. S. 312, and *Patton* v. *U. S.,* 281 U. S. 276, and continuing thru *Canizio* v. *New York,* decided February 4, 1946, 327 U. S. 82.

Tompkins alleged in a petition filed in 1944 (*Tompkins* v. *Missouri,* 323 U. S. 485) that he was charged in 1934 with murder in the first degree, pleaded guilty and was con-

victed and sentenced for a life term; that he was not represented by counsel, was ignorant of his right to demand counsel in his behalf, was incapable adequately of making his own defense, and did not waive his Constitutional right to the aid of counsel. In reversing the Missouri Supreme Court, this Court said (p. 487, 488, 489):

> "*Powell* v. *Alabama*, 287 U. S. 45, 71, held that at least in capital cases 'where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, *it is the duty of the Court, whether requested or not,* to assign counsel for him as a necessary requisite of due process of law'. Under that test, *a request for counsel is not necessary.* One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his own defense * * * One who was not represented by counsel, who did not waive his right to counsel and who was ignorant of his right to demand counsel, is one of the class which the rule of *Powell* v. *Alabama* was designed to protect * * *."
>
> "The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. * * * The punishments for the offenses are different. * * * The differences between them are governed by rules of construction meaningful to those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. *The guiding hand of counsel is needed* lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." (Italics added.)

Williams v. *Kaiser*, 323 U. S. 471, is a companion to the *Tompkins* case, the only distinction being that Williams alleged that he had requested the aid of counsel prior to pleading guilty and being convicted. Williams also was charged with a capital offense—robbery with a deadly weapon. This decision emphasizes the importance of the distinctions between degrees of robbery and larceny and of technical requirements relating to evidence, instructions, and offenses. The complexities were stated to be: "a closed book to the average layman," (page 475) and to emphasize the actualities of the necessity for counsel in connection with a plea as well as in the conduct of a trial.

The same principles were applied in a non-capital case of an Indian who had pleaded guilty, without benefit of counsel, to a charge of burglary in a Nebraska State Court. *Rice* v. *Olson*, 324 U. S. 786. He alleged that he was ignorant of the law, although the burglary statute was read to him, and of his Constitutional rights to counsel, and also asserted that the alleged crime was committed on an Indian Reservation which was exclusively within Federal Jurisdiction. Holding that a plea of guilty was not a waiver in that case this Court ruled (page 788) that the technical problems involved in the issues in the case, emphasized the petitioner's need for counsel of experience and skill.

We submit that a result identical with the reversals in the *Tompkins*, *Williams*, and *Rice* cases, *supra*, would have been reached in *Canizio* v. *New York*, 327 U. S. 82, but for two important differences in fact. First, Canizio did not plead guilty to a capital offense; second, after Canizio had pleaded guilty to a non-capital offense, an attorney entered a general appearance in the case and represented him actively in long hearings during the day of sentence. The Court's opinion concluded that this attorney could have moved to withdraw the plea of guilty and that the trial court

would have had the power to set aside the plea and let the petitioner stand trial; that petitioner actually had the benefit of counsel. Quite aside from the question of the timeliness of the appearance of Canizio's counsel it appears that the petitioner was able to and did employ counsel who filed a general, rather than a restricted appearance, and that Canizio did not plead guilty to a capital offense.

The "fundamental" character of this petitioner's right under the Fourteenth Amendment cannot be disputed. This Court has declared repeatedly and with the greatest emphasis that the right of a citizen to the aid of counsel is "fundamental". *Hebert* v. *Louisiana*, 272 U. S. 312, 316, 317, says:

> "The due process clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable the Court to revise the decisions of the State Courts on questions of State law. What it does require is that State action, whether thru one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'. Those principles are applicable alike in all the States and do not depend upon or vary with local legislation."

Explaining the rationale for this fundamental right of aid to counsel, this Court said in *Powell* v. *Alabama*, 287 U. S. 45, 69:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with the crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue

or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect." (Italics added.)

See also *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244;
Glasser v. *U. S.*, 315 U. S. 60, 70, 76;
Avery v. *Alabama*, 308 U. S. 444;
Smith v. *O'Grady*, 312 U. S. 329;
Betts v. *Brady*, 316 U. S. 455;
Williams v. *Kaiser*, 323 U. S. 471, 475.

(Controlling cases upon the question of waiver are presented under Point II of this Argument.)

C. A Citizen Charged With a Capital Crime is Entitled to Counsel at Every Step of the Proceedings Against Him.

The petitioner, a negro cook with no schooling, had been confined and harried about for fifteen days before arraignment. His need for counsel during this period and prior to pleading was extreme. He should have had confidential conferences with a competent attorney so that he might understand his plight and the alternative courses that were open to him. Under the circumstances, a patient and intelligent legal advisor was essential if this petitioner was to comprehend even the simpler general aspects of his situation and of the courses he might follow. Prompt and thorough investigation of the facts and a careful search for witnesses was imperative before an intelligent decision could be made not only as to the extent of provocation and right to a plea of self-defense, but also as to the possibility that local

prejudice and tension might justify a change of venue or a postponement.

It is not enough that counsel be appointed—the appointment must be effective. And to be effective, it must be timely. In *Williams* v. *Kaiser*, 323 U. S. 471, 475, this Court reviewed the considerations that require the appointment of counsel in a capital case, and said:

> "Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial".

The petitioner needed and was entitled to the "guiding hand of counsel at every step in the proceedings against him". *Powell* v. *Alabama*, 287 U. S. 45, 69. This "guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed". *Tompkins* v. *Missouri*, 323 U. S. 485, 488.

The critical period for the petitioner was the time prior to and during his arraignment. These were "steps in the proceeding against him". When his need was greatest, he was denied the "guiding hand of counsel". The critical nature of the early stages in such a proceeding was recognized in *Powell* v. *Alabama*, 287 U. S. 45, 57:

> "• • • during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

These decisions recognize the actualities that face an ignorant and indigent citizen who is charged with a capital

crime. His need for help is not met and his undoubted rights are not protected by a routine general statement of his rights to counsel and jury trial, given from the elevation of the bench by a trial judge. This routine is meaningless for all practical purposes when the citizen has already "expressed" a desire to plead guilty. An unschooled and simple man, more than one experienced in distinctions and technicalities, might readily be held back from making a request for counsel and a jury trial when he has already expressed a desire to plead guilty. This could easily appear to him to be a fatal inconsistency for he might say to himself "How can I ask to have a lawyer and a trial since I have already told this judge, who will try the case, that I plead guilty".

Such a man does not plead guilty to "the crime of murder as charged in the indictment". He pleads guilty to an *act* (*Evans* v. *Rives*, 126 Fed. 2nd 633) without any realization that this act may well have been manslaughter or assault with a deadly weapon. The only realistic course in such a case is to appoint counsel. To be effective, this appointment must be timely; that is, the need of counsel must be met before an affirmative step is taken by the defendant. For these reasons,[1] this Court has declared repeatedly that

---

[1] In addition to the Controlling Decisions set out in Argument, supra, see the authorities cited in Petitioner's Brief (pages 27-30) under the heading "Modern Authorities Generally Support the Right of an Accused to Counsel Prior to Arraignment", in *Walker* v. *Johnston*, 312 U. S. 275, No. 173, October term, 1940, Supreme Court of the United States.

A review of the provisions of the Constitution of the thirteen original States concerning the right to counsel, and other historical references are set out in *Betts* v. *Brady*, 316 U. S. 455, 465-471.

Note 2 and the Appendix thereto of the dissenting opinion in *Betts* v. *Brady*, 316 U. S. 455, 477-480 is an exhaustive summary and review of the State Statutes and citations pertaining to:

1. States which require that indigent defendants in non-capital as well as capital criminal cases be provided with counsel on request.

2. States which are without Constitutional provisions, or judicial decisions clearly establishing this requirement.

citizens are entitled, in State as well as Federal Courts, to the aid of counsel "At every step in the proceedings".

D. The Gravity of the Charge and the Intricacies of the Defense Emphasize Petitioner's Need for Counsel.

The five-page indictment in this case must have appeared to this petitioner and most laymen, to have been an involved document filled with repetitions, circumlocution and ambiguity. Yet the petitioner—who had no schooling—was handed a copy of the indictment only upon his arraignment and then was asked to plead. If he had both the time and ability to read the document he could not have made out much more than that it accused him with Livera Word of killing James Churchill. Surely he could not be expected to cope with the complexities of the Illinois Statutes and decisions and the distinctions that they make between murder, manslaughter, assault with a deadly weapon, and the lesser degrees of assault.

Standing at the Bar upon arraignment, the petitioner could hardly be expected to grasp that the documents just handed to him, while charging him with murder, would have supported a conviction, on a plea of not guilty, of one of several lesser crimes carrying diminishing amounts of punishment in relation to the gravity of the offenses.[2]

---

3. States in which dicta of judicial opinion are in harmony with the decisions by the Court below in *Betts* v. *Brady, supra.*

4. States in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected.

[2] Under this indictment for murder, the petitioner could have been convicted of manslaughter or any lesser degree of homicide, *People* v. *Lewis*, 375 Ill. 330, 31 N. E. 2 (d) 795 (1941) or felonious assault, *People* v. *Dugas*, 310 Ill. 291, 141 N. E. 769 (1923). In *People* v. *Lewis, supra*, the indictment charged that the accused "unlawfully, feloniously, wilfully and of his malice aforethought killed and murdered—contrary to the statute—". (375 Ill. 330, 331) A conviction of manslaughter was sustained by the Illinois Court saying, "The common factor and the essential element which constitutes a crime—is the unlawful killing of a human

Counsel was needed to consider and advise with the petitioner concerning the presence or absence of express or implied malice, and the extent of the provocation given by the deceased; he was needed to weigh the availability of a plea of self-defense. Counsel's advice was indispensable to an intelligent decision by the accused as to pleading guilty to the crime of murder, or manslaughter or of a lesser offense and in choosing or waiving a jury trial. The fact that petitioner had never seen the deceased before the fatal encounter (R. 31) would be weighed by his counsel along with the additional facts developed in the course of a careful investigation of the facts and interrogation of the numerous witnesses.

The intricacy and complexity of the problems and the difficulties and the possibly fatal importance of his unaided

---

being." (375 Ill. 330, 333) "• • • when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the jury may discharge the accused of the higher crime and convict him of the lower • • •" (375 Ill. 330, 334).

In *People* v. *Dugas, supra,* the accused was indicted, tried and convicted of assault with the intent to kill. A motion for a new trial was denied. After this trial, the victim of the assault died and the accused was indicted, tried and acquitted of murder. The motion for new trial in the assault case was revived and again denied; on appeal the Illinois Supreme Court reversed the denial saying:

> "The acquittal of the plaintiff in error on the indictment which charged him with murder acquitted him of every charge included in this crime. If it (the murder acquittal) had occurred before his trial on the indictment for the assault the judgment would have been admissible on that trial as evidence of a previous acquittal • • •. Under an indictment for murder by means of a felonious assault the defendant may be convicted of any lower degree of crime embraced within the charge of murder made in the indictment." (310 Ill. 291, 300).

The provision of the Illinois Constitution, relating to rights of accused in criminal prosecutions, and the Illinois Statutes relating to Homicide are set out in the Appendix. By these Statutes "Murder" is defined as the unlawful killing of a human being with either express or implied malice; "Manslaughter" as unlawful killing of a human being without malice. "Manslaughter" is further divided in two classifications

choice of procedure, at the time of and before arraignment bring this case squarely within the decisions of this Court in decided cases. This Court has recognized:

> "• • • the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty • • •. That which is simple, orderly and necessary to the lawyer, to the untrained layman, may appear intricate, complex and mysterious". *Johnson* v. *Zerbst*, 304 U. S. 458, 462, 463.

In the case at Bar, as well as in *Williams* v. *Kaiser*, 323 U. S. 471, 475, 476:

> "Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman • • • needs the aid of counsel lest he be the victim of over-zealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment. These are reasons why the right to counsel is 'fundamental'. *Powell* v. *Alabama*, 287 U. S. 45, 70; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-44; *Avery* v. *Alabama*, 308 U. S. 444, 447".

This petitioner is in the identical posture described in *Tompkins* v. *Missouri*, 323 U. S. 485, 488, 489:

> "The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. • • • The punishments for the offenses are different. • • • The differences between them are governed by rules of construction meaningful to

---

viz: "Voluntary Manslaughter" being the killing of a human being as the result of an irresistible passion and "Involuntary Manslaughter" being a killing resulting from the commission of a lawful or unlawful act, the performance of which would not ordinarily cause the loss of life.

"Self-Defense" is specifically stated to be a valid defense for homicide. (*see Appendix*).

those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed."

E. The Appointment of Mr. Tuesburg Was an Admission of Petitioner's Ignorance and Indigence; This Appointment Was Limited to a Special Hearing and Did Not Constitute a General Appearance for Petitioner.

After petitioner's plea of guilty had been accepted, judgment of conviction was entered immediately. At a later hearing on the same day the trial judge appointed L. W. Tuesburg, a member of the Bar, to appear for the petitioner on a hearing on the "question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty" (R. 9). The restricted nature of the appointment is made especially clear by the repetition in both the judgment of conviction and in the judgment imposing sentence (R. 10-12) of the phrase "question of mitigation or aggravation".

But the appointment of Mr. Tuesburg is significant. It supports—if it does not compel—the conclusion that the trial judge realized that the petitioner was helpless.

The petitioner does not urge that his rights were invaded by the appointment of Mr. Tuesburg after he had pleaded guilty and had been convicted of murder without the aid of counsel. Instead the petitioner welcomes—then as now—all the legal assistance he can get, however far short it may fall from providing him with due process of law.

The entrance of Mr. Tuesburg into the case was for the special purpose of complying with the Illinois Statute (*Ill. Rev. Stat.* 1945 CH 38, par. 732) reading as follows:

> "In cases where the party pleads 'guilty', such plea shall not be entered until the Court shall have fully explained to the accused the consequence of entering such plea; after which, if the party persist in pleading 'guilty', such plea shall be received and recorded, and the Court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the Court possesses any discretion as to the extent of the punishment, it shall be *the duty of the Court to examine witnesses as to the aggravation and mitigation of the offense.*" (Italics added.)

Under this statute, this "hearing" was mandatory, but it was not a "trial" in the ordinary sense. *People* v. *Popescue*, 345 Ill. 142, 177 N. E. 739; *People* v. *McWilliams*, 348 Ill. 333, 180 N. E. 832.

The purpose of the appointment may have been to assist the Court, in performing "the duty of the Court to examine witnesses". Regardless of motivation, the appointment was made for a specifically limited purpose and did not cure the damage that the petitioner had suffered by a denial of the aid of counsel in the earlier stages of the proceedings.

F. In This Capital Case the Totality of the Facts and Circumstances Required an Effective Appointment of Counsel Before Acceptance of a Plea of Guilty.

There is a striking contrast between the ignorance and indigence of the petitioner at Bar and the education, experience and presumed financial resources of the relator, one McCann, in *Adams* v. *U. S.*, 317 U. S. 269. Although McCann's rights to counsel and jury trial were not found

to have been denied in that case, the opinion states the general rule, pages 275, 276:

> "Certain safeguards are essential to criminal justice. • • • The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with a crime, the assistance of counsel for his defense. Such assistance 'in the particular situation' of 'ignorant defendants in a capital case' led to recognition that 'the benefit of counsel was essential to the substance of a hearing', as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in State Courts. *Palko* v. *Conn.*, 302 U. S. 319, 327".

Again, while finding that there was not a denial of due process by the refusal of a State Court to appoint counsel in the non-capital case before it, this Court held in *Betts* v. *Brady*, 316 U. S. 455, 462:

> "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

In the *Betts* case, the accused was considered by a majority of the Court not to be helpless but possessed of sufficient ability to protect himself on a trial of a narrow issue presented by an alibi. So also in *Avery* v. *Alabama*, 308 U. S. 444, all the facts and witnesses relating to a possible legal defense of insanity were available to counsel.

But this petitioner was obviously incapable, without aid of counsel, of protecting himself against a capital charge. Even a proper marshaling of the facts was beyond his wit and circumstance—just as the intricacies and complexities of his legal defenses were outside his ken. Here there was a

connected series of altercations participated in by at least seven people and covering a period of twenty minutes or more. While eight witnesses were known to be in the vicinity—two teamsters, two fishermen and four women (R. 17, 21, 24), other persons may have been witness to part or all of the affray. At least the transcript does not show what became of the young colored boy who went fishing with the petitioner and the four women (R. 24), and presumably, he was still near the scene when the petitioner and Livera Word returned. And, the testimony of Chester Herndon, suggests that there may have been other witnesses. He said, "He might have heard the shots but he didn't pay any attention; that there is so much shooting down that way—by hunters and fishermen and loafers. That if he had heard any shooting he would not have paid any attention" (R. 22).

Here there was a clear and compelling need for counsel to investigate and weigh the facts, to advise with the petitioner as to his plea, and to direct his defense. As this Court said in *Glasser* v. *U. S.*, 315 U. S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial".

II

Neither his plea of guilty nor his failure to claim and demand aid of counsel, amounted to an intelligent and competent waiver of counsel by this petitioner.

A. Controlling Decisions in This Court

The question of a purported waiver of the Constitutional right to the aid of counsel is not new in this Court. A number of cases have turned upon whether or not in a given set of

circumstances, a plea of guilty, or an affirmative action or declaration, constituted an effective waiver of the right to counsel or to a jury trial.

"Waiver" was defined in *Johnson* v. *Zerbst*, 304, U. S. 458, 464:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

Again, in holding that an effective waiver of counsel had been made by a defendant who had refused to employ or accept the appointment of counsel, asserting that while he was not a lawyer, he had studied law and considered himself competent to handle his own defense, this Court said in *Adams* v. *U. S.*, 317 U. S. 269, 277-279:

> "The question in each case is whether the accused was competent to exercise an intelligent, informed, judgment—and for determination of this question, it is of course relevant whether he had the advice of counsel. * * * And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused, must depend upon the unique circumstances of each case. * * * He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69."

It is the duty of the trial judge to determine whether there has been an express and intelligent waiver of a Constitutional right. This duty increases with the gravity of the offense and "is not to be discharged as a mere matter of rote". *Patton* v. *United States*, 281 U. S. 276, 312.

In case of a proper waiver of a Constitutional right by an accused who is without counsel, and whose life or liberty is

at stake, *the record should show* whether the trial Judge has determined that the accused has made an intelligent, competent and affirmative waiver. *Patton* v. *United States, supra; Johnson* v. *Zerbst,* 304 U. S. 458, 465; *Walker* v. *Johnston,* 312 U. S. 275, 286.

A plea of guilty is not, of itself, a waiver of the right to counsel.

Rice v. *Olson,* 324 U. S. 786, 788;
Tompkins v. *Missouri,* 323 U. S. 485, 488;
Walker v. *Johnston,* 312 U. S. 275, 286;
Smith v. *O'Grady,* 312 U. S. 329, 334;
Frame v. *Hudspeth,* 309 U. S. 632, reversing *Frame* v. *Hudspeth,* 109 F. (2d) 356 with agreement of Solicitor General;
Evans v. *Rives,* 126 F. (2d) 633.

B. Under the Circumstances, a Plea of Guilty to a Charge of Murder Was Not a Waiver of the Right to Aid of Counsel.

Any contention that the plea of guilty entered in this case constitutes a waiver of the petitioner's right to counsel, would fly in the face of the decisions of this Court. In *Rice* v. *Olson,* 324 U. S. 786, 788, 789 the opinion reads:

> "*A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.* It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel. Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute." (Italics added.)

A plea of guilty by the accused in *Tompkins* v. *Missouri,* 323 U. S. 485, 488 was not considered to be a waiver. In that case and in *Rice* v. *Olson, supra,* and in the case at Bar,

no request was made for the appointment of counsel. To the same effect was *Walker* v. *Johnston*, 312 U. S. 275, 286; *Smith* v. *O'Grady*, 312 U. S. 329, 334; *Frame* v. *Hudspeth*, 309 U. S. 632 (reversing *Frame* v. *Hudspeth*, 109 F. (2d) 356); *Evans* v. *Rives*, 126 F. (2d) 633.

Petitioner's plea of guilty, under the circumstances here, merely emphasizes his need of counsel.

C. The Failure of This Petitioner to Take Affirmative Action in Order to Obtain Counsel, Was Not an Express and Intelligent Consent to the Loss of His Constitutional Rights. Petitioner Did Not Affirmatively Waive His Federal Right to Counsel.

This petitioner made no affirmative waiver of his rights. Instead, (after he had pleaded guilty) he merely failed to take affirmative action claiming his right to counsel. Under the Illinois Statute and Decisions [3] he was required to do two things in order to obtain counsel: first, make a request and second, make an oath that he was unable to procure

---

[3] The Illinois Statute in effect in 1928, at the time of petitioner's arraignment and conviction reads: (*Ill. Rev. Stat.* 1927, chap. 38, par. 754);

> "Every person *charged with crime* shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the Court shall assign him competent counsel, who shall conduct his defense. In all cases, counsel shall have access to persons confined, and shall have the right to see and consult such persons in private." (Italics added.)

In 1929 a paragraph was added to the foregoing statute indicating a legislative policy to provide greater protection to indigent defendants in capital cases and to meet the actualities of modern conditions by providing for the payment of fees to counsel appointed by the Court for such defendants. The addition reads in part (*Ill. Rev. Stat.* 1945, Chap. 38, par. 730):

> "Whenever it shall appear to the Court that a defendant or defendants *indicted in a capital case*, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the Court to appoint one or more competent counsel for that defendant or defendants, who shall receive a reasonable sum for services, * * *". (Italics added.) However, in *People* v. *Bernovich*, 391 Ill. 141, 143; 62 N. E.

counsel. While the petitioner failed to take these two steps, it is equally clear that he did not take any affirmative action that could be construed as a competent and intelligent waiver of his Constitutional right.

Petitioner's failure to claim the aid of counsel is in sharp contrast to the affirmative statements made by the relator, McCann in *Adams* v. *United States*, 317 U. S. 269. There the record on appeal showed that McCann had refused to employ counsel and had refused the aid of counsel stating that he had studied law and was as competent, or more competent than a lawyer, to handle his own defense.

Petitioner's failure to claim the aid of counsel is a far cry from the situation presented by Glasser, an experienced attorney, and a former United States District Attorney, and who was actively represented by counsel at the time of an alleged waiver. *Glasser* v. *United States*, 315 U. S. 60, 70. Glasser was held to have been denied due process of law on the ground that he had "never affirmatively waived" an early objection that he had voiced to the appointment of his attorney as counsel for a co-defendant. In contrast, this petitioner—who stood at the Bar alone after fifteen days in jail without recourse to outside help—merely failed to claim the aid of counsel. *Glasser* v. *United States, supra.*

Any contention that there was a waiver in this case must rest upon the recitals in the judgment orders of the trial Court's "explanation" to the petitioner of his rights. Such a contention must fail, for when the recitals are laid alongside the Illinois statute, they show no more than a studious attempt to comply with a statutory requirement.

2nd. 691, the Illinois Supreme Court held (1945) in the capital case before it that:

"• • • it is well settled that in Illinois no duty is imposed upon the Court to appoint legal counsel for an accused unless he states upon oath his inability to procure legal assistance".

The Illinois Statute (*Ill. Rev. Stat.* 1945, Chap. 38, par. 732) states in part:

> "In cases where the party pleads 'guilty', such plea shall not be entered until the Court shall have *fully explained to the accused the consequences of entering such plea;* after which if the party *persists* in pleading 'guilty', such plea shall be received and recorded, and the Court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury * * *" ((Italics added).

The judgment order (R. 8) states that the Court:

> "*Fully explained to the Defendant* * * * *the consequences of such plea* and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury * * * and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant * * * *persists* in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment." (Italics added.)

The italicized portions of the above quotations show clearly that the essential phrases have been lifted from the statute in a manner that is suggestive of the discharge of the Court's duty "as a mere matter of rote" (*Patton* v. *United States*, 281 U. S. 276, 312).

A contention that the trial Court "fully explained" the petitioner's rights is the equivalent of suggesting that the trial Court acted effectively in lieu of the aid of counsel to which petitioner was entitled at every stage of the proceedings. Disposing of a similar suggestion in *Powell* v. *Alabama*, 287 U. S. 45, 61 this Court said:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in

the proceedings before the Court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

Moreover, such an inadequate substitute for an effective appointment of counsel, came too late. This ignorant and indigent man, whose helplessness is attested by the Court's subsequent action on the later hearing upon the question of mitigation or aggravation, had already laid his course. Without aid of counsel or knowledge of the consequences or alternatives he had tendered his plea of guilty.

In this capital case, the natural bewilderment, ignorance and indigence of this petitioner combined with the myriad legal questions and complexities presented in the trial proceedings made him incompetent to accomplish an effective waiver of his Constitutional right. *And he took no affirmative step to do so.* In short, the circumstances at Bar taken as a whole, raise the same considerations that led this Court to say in *Williams* v. *Kaiser*, 323 U. S. 471, 475:

> "These considerations underscore what was said in *Powell* v. *Alabama*, supra: 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect!' *Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial.*" (Italics added.)

D. Every Reasonable Presumption is Indulged Against a Purported Waiver of Fundamental Constitutional Rights.

Presumptions indulged by this Court militate against the waiver or loss of fundamental Constitutional rights. In *Johnson* v. *Zerbst*, 304 U. S. 458, 464, this Court said:

> "It has been pointed out that Courts indulge every reasonable presumption against waiver of fundamental Constitutional rights. *Aetna* v. *Kennedy*, 301 U. S. 389, 393; *Hodges* v. *Easton*, 106 U. S. 408, 412; and that we 'do not presume acquiescence in the loss of fundamental rights. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307' ".

Again this Court has said (*Glasser* v. *United States*, 315 U. S. 60, 70):

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

E. The Record Does Not Show a Determination by the Trial Court That There Was a Competent and Intelligent Waiver by This Petitioner.

The very reasons that guarantee the right to counsel—the gravity of the charge, complexities and intricacies of pleading and trial and varying degrees of punishment to different crimes contained within a single charge—all these require at the same time that an accused be safeguarded by the aid of counsel from the unwitting loss of fundamental rights. If this aid is withheld it is essential that a clear

record be presented of the trial Court's determination of the validity of a claimed waiver. Ignorance, illiteracy, poverty, fear, bewilderment—all these weaknesses or any of them must be taken into account and overcome by the record before there is an effective yielding of the Federal right.

Nor is there any indication on the record of a colloquy—that the petitioner here was interrogated by the Court as to his desire to plead. (*Walker* v. *Johnston*, 312 U. S. 275, 286.) There is no reference to the making of inquiries that, if made, may have elicited answers upon which the trial Court may have based a determination of the petitioner's competence and intelligence. The record is barren of anything that could establish an affirmative waiver.

The petitioner had no schooling and no record of previous experience with Courts. Thirty years of age, he had worked the previous eleven years, as a cook, chauffeur and mechanic. After fifteen days of confinement (during which he charges that he was held *incommunicado* and moved from one county jail to another as a result of mob violence), the petitioner was brought to the Bar for arraignment. Only then was he shown a copy of an indictment charging him with murder. Under these circumstances, the same reasons that have guaranteed to such a man, "the guiding hand of counsel at every step of the proceedings against him" (*Powell* v. *Alabama*, 287 U. S. 45, 69) compel the conclusion that this petitioner required the assistance of counsel before he could make an "intelligent and competent waiver".

He could not waive what he could not understand. The intricacies and complexities of the charges and the possibilities of acquittal of the charge of murder upon a plea of guilty to manslaughter would have been most difficult for him to grasp, even if they had been explained to him. His

ignorance was the cause of his failure to claim and insist upon aid of counsel, and the same ignorance is the barrier to any claim that he made an effective waiver of that right.

The serious nature of the responsibility imposed upon a trial Court in considering a purported waiver by an accused, is emphasized by two decisions of this Court. Equal emphasis has been placed upon the increase in responsibility in proportion to the gravity of the offenses dealt with. In *Patton* v. *United States*, 281 U. S. 276, 312, this Court determined the validity of a waiver under the Sixth Amendment saying:

> "before any waiver (of trial by a constitutional jury) can become effective, the consent of government counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. *And the duty of the trial Court in that regard is not to be discharged as a mere matter of rote,* but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." (Italics added.)

In the second case, *Johnson* v. *Zerbst*, 304 U. S. 458, 465, this Court ruled:

> "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial Court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be determined by the trial Court, and *it would be fitting and appropriate for that determination to appear upon the record.*" (Italics added.)

The silent acceptance by the defendants in *Powell* v. *Alabama, supra,* of an ineffective appointment of counsel was not suggested to be a waiver of their fundamental rights. So here the silent acceptance of strange and bewildering proceedings by an ignorant and helpless defendant who had already offered his plea of guilty was likewise not a waiver of fundamental rights. It was no more than an ignorant failure to claim them.

Conclusion

It is the petitioner's position that, under all the circumstances in this capital case, he was denied his Constitutional right to the aid of counsel, and did not waive that right; that to hold otherwise

> "* * * would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard' ". *Powell* v. *Alabama,* 287 U. S. 45, 71.

APPENDIX

Illinois State Constitution Art. II, Sec. 9. Right of accused in criminal prosecutions.

"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witness in his behalf and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." (*Ill. Rev. Stat.* 1945.)

The following statutory provisions appear in the Illinois Code under the heading "Homicide".

Murder: Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances, capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. (*Ill. Rev. Stat.* 1945, Chap. 38, par. 358.)

Murder—Punishment: Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the Court. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 360).

Manslaughter Defined: Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful

act, or a lawful act without due caution or circumspection. (Ill. Rev. Stat., 1945, Chap. 38, par. 361.)

Manslaughter voluntary: In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 362.)

Manslaughter involuntary: Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 363.)

Manslaughter—Punishment: Whoever is guilty of manslaughter shall be imprisoned in the penitentiary for from one to fourteen years. (As amended by act approved July 6, 1927. L. 1927, p. 398.) (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 364.)

Self-Defense: If a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given. (*Ill. Rev. Stat.* 1945, Chap. 38, par. 367.)